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Nos. 03-622 & 03-627

In The
SUPREME COURT OF THE UNITED STATES

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DAVID HENSON MCNAB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

♦———♦

ROBERT D. BLANDFORD, ABNER SCHOENWETTER,
AND DIANE H. HUANG,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

♦———♦

On Petition for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

♦———♦

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL WILDERNESS INSTITUTE IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL WILDERNESS INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

The National Association of Criminal Defense Lawyers ("NACDL") is the preeminent bar organization advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has more than 10,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer

members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization in its House of Delegates. NACDL promotes study and research in the field of criminal law. NACDL has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice. In furtherance of its objectives over the past decade, NACDL frequently files *amicus* briefs with this Court on various criminal justice issues. *See* NACDL's website at www.nacdl.org.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members of NFIB own a wide variety of America's independent businesses from restaurants to manufacturing firms to bowling alleys.

The NFIB Legal Foundation is concerned about the effect of the increasing number of regulatory crimes on small business. Small businesses, like the Petitioners, are required to comply with a myriad of Federal and State regulations. Not surprisingly, many well-meaning, small-business owners are unaware of all of their legal obligations. Because failure to observe a regulatory obligation often carries a criminal penalty, this reality is particularly troubling. Even more disturbing are cases, such as this one, in which small business owners are convicted for regulatory crimes absent specific intent, and based upon the application of uncertain foreign law.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Members of NAM are subject to the increased use

of criminal penalties in the regulatory state and to the uncertainty that attends the obligation to comply with laws and regulations of multiple (domestic and foreign) jurisdictions whose own construction of those laws is often ambiguous.

National Wilderness Institute ("NWI") is a private, non-profit conservation organization best known for its authoritative studies of wildlife conservation programs. Although NWI publications cover all environmental issues, endangered species conservation has been a particular focus of the organization. NWI studies have revealed shortcomings in current wildlife programs that often limit their effectiveness and waste conservation funds.

Since its founding in 1989, NWI has advocated new approaches to environmental problems including the use of market incentives and technological advancements as a way to improve the environment. These views sometime set it apart from other environmental groups. The American Conservation Ethic, available at the web site www.nwi.org, sets forth NWI's general principles.[1]

SUMMARY OF ARGUMENT

Review in these cases is warranted.[2] Petitioners' eight-year sentences for the effectively *scienter*-less regulatory offense of importing lobster tails in violation of non-existent Honduran law should be reversed.[3]

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[1] Counsel for the parties have consented to the filing of this *amicus* brief; the letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici* or their counsel.

[2] Petitioner McNab (No. 03-622) and Petitioners Blandford, Schoenwetter, and Huang (No. 03-627) have filed separate petitions. The United States has chosen to file a consolidated response and this *amicus* brief is directed to the issue presented in both petitions – the applicability of foreign law to domestic regulatory conduct.

[3] Petitioners McNab, Blandford and Schoenwetter were each

The convictions and sentences result from the confluence of two events – the expansion of the reach of the Commerce Clause powers of the Federal government and this Court's determination in *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57 (1910) that the State may "eliminate the question of intent" from any criminal provision without violating the Due Process clause of the Fourteenth Amendment. These developments have led, inevitably, to the complete erosion of the *mens rea* requirement and the expansion of the concept of "public welfare offense." Today, in effect, one who acts in any business or social capacity (as Petitioners did) is subject to what Justice Stewart characterized as a form of "absolute liability." *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 569 (1971) (Stewart, J., dissenting).

These Petitions emphasize the importance of these two doctrinal developments and demonstrate the potentially pernicious applications of these doctrines to regulatory matters involving the application of foreign law. The reconfiguration of criminal law through a concerted, long-term crusade to dilute traditional criminal intent requirements allows the government to engage in grotesque over-charging such as that demonstrated here – pyramiding trivial civil infractions of uncertain (and now disavowed) foreign law into smuggling and money laundering offenses that carry astronomical and unjust domestic criminal penalties.

No reasonable observer can doubt that the scope of substantive criminal law has expanded enormously. Today it is called into the service of an extraordinary range of purposes. Beyond its original function of minimizing violent behavior threatening to lives and property, criminal law is now also used to regulate economic enterprise, protect the environment, correct relations among races and genders, and alter habits of consumption of liquor, drugs, and sex. *See, e.g.*, R. Pound, Criminal Justice in America 23 (1930).

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sentenced to 97-month terms of imprisonment. Petitioner Huang was sentenced to a two-year term of imprisonment.

As the Court has long noted, the origin of the public welfare doctrine lay in the belief that "public welfare" offenses typically involve only modest penalties. *E.g. Morissette v. United States*, 342 U.S. 256, 256 (1952) ("penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). For this reason, the Court has often approached (but never adopted) a rule of construction that would delimit the "public welfare" doctrine and attendant reductions in the *mens rea* requirement to those cases where a "harsh penalty" is not imposed. *See Staples v. United States*, 511 U.S. 600, 616 (1994).

There can now be little doubt that the fundamental premise of this Court's "public welfare" jurisprudence – the presumed modest nature of the criminal penalties attending such offenses – is, as this case painfully demonstrates, false to fact. The foundations of the doctrine have been undermined and review of the doctrine's unwarranted application to Petitioners -- whose alleged violation of a now-disavowed foreign civil law is the sole basis for prosecution -- is therefore appropriate.

ARGUMENT

This Court's plenary review is warranted because the decision of the Eleventh Circuit improperly expands and misapplies the concept of "public welfare offense" to a case involving regulatory "crimes" that have severe domestic penalties despite involving violations only of foreign law that would, if prosecuted in that foreign country be, at most, trivial civil infractions. The issue presented – the interpretation of foreign law and its criminal application to American businesses engaged in an increasingly global economy -- is one of surpassing importance inasmuch as the growth of the American regulatory state has rendered the criminal law applicable to virtually all domestic (and now foreign) productive social and economic conduct.

I. The Question Presented Involves An Issue of Public Importance And Wide Application.

As the scope of the criminal law has expanded, the trend has been to criminalize conduct even where the alleged criminal has acted with diminished, or non-existent intent. While this Court has often noted the fundamental importance of the concept of *mens rea* in our criminal law, the actual treatment of that concept has been reduced to one of statutory interpretation. Not since the early part of the last century has the Court considered whether there are constitutional dimensions to that concept; and its treatment of *mens rea* in that era was, in the words of one noted scholar of criminal law, "flimsy. . .dictum." That dictum has since became a doctrine of "constitutional law that severe criminal punishment may be inflicted at the legislature's will, regardless of whether the defendant had any opportunity to conform his conduct to the requirements of law." H. Packer, "Mens Rea and the Supreme Court," 1962 Supreme Court Review 107, 116.

But that flimsy dictum now has widespread effect. That effect can be felt in all domestic economic and social activity and, as these Petitions demonstrate, now portends palpable effects on those engaged in foreign trade. It would be easy to think that the question presented in these Petitions is of little practical importance – easy, but wrong. The reality is that "public welfare" crimes are a growth industry.

1. Estimates of the current size of the body of federal regulatory criminal law vary. The American Bar Association reported in 1998 that there were in excess of 3,300 separate federal criminal offenses. *See* American Bar Association, *The Federalization of Criminal Law* (1998), Appendix C; *see also* Ronald L. Gainer, "Federal Criminal Code Reform: Past and Future," 2 Buff. Crim. L. Rev. 46, 53 (1998). More than 40 percent of these laws have been enacted in just the past 30 years, as part of the growth of the regulatory state. *See Federalization of Criminal Law* at 9 & 11 (Chart 2). These laws are scattered in over 50 titles of the United States Code,

encompassing roughly 27,000 pages, *see* Gainer, *Federal Criminal Code* at 53, rendering them effectively unknowable.

Worse, the statutory code sections often incorporate by reference the provisions and sanctions of administrative regulations promulgated by various agencies under congressional authorization. Estimates of how many such regulations exist are even less well settled, but the ABA thinks there are "[n]early 10,000." *Federalization of Criminal Law* at 10.

And the growth in the scope of criminal law is, if it is possible, exacerbated by statutes such as the Lacey Act, which criminalize violations of foreign laws (and, arguably, foreign regulations). In this age of globalization, even small and mid-size businesses are likely to engage in both domestic and foreign operations. It simply beggars the imagination to envision how a conscientious businessman might inform himself of the laws (and regulations!) of more than 190 nations. Yet, the construction given the Lacey Act in this case requires such an effort, criminalizes the failure to do so, and, through the magic of money laundering statutes, imposes a cruel and severe eight-year penalty on those who, in the prosecutor's discretion, are deemed worthy of punishment.

2. Nor is the growth in the number of federal criminal statutes merely an academic question, without real world effects. Another measure of the extent to which criminal enforcement of regulatory prohibitions has grown is the resources that have been devoted to the effort. In 2002 (the latest year for which data is available), for example, the Fish and Wildlife Service had 772 sworn law enforcement officers; the Forest Service another 658; Bureau of Land Management – 235; Environmental Protection Agency – 220; Food and Drug Administration – 162; and the National Marine Fisheries Service (whose prosecution is directly at issue in this case) employed 137 law enforcement officers. *See* Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2002* (http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo02.pdf). There can

be little doubt that the Federal government expects results from its investment of these resources.

And those results are evident. Between March 2001 and March 2002 (again, the latest year for which data are available), federal prosecutors commenced 62,957 cases, involving 83,809 individual defendants. *See* Administrative Office of United States Courts, "Federal Judicial Caseload Statistics," Table D-2 (http://www.uscourts.gov/caseload2002/contents.html). More than 3,100 of these defendants were charged with crimes categorized as violations of "federal statutes" -- a category broadly (though not precisely) congruent with charges reflecting violations of a regulatory program. *Id.* This number exceeds the number of federal prosecutions during the same year for a host of common law offense categories, including murder, robbery, embezzlement, forgery, and sex offenses. Put another way, more federal prosecutorial resources are invested in regulatory prosecutions than in the prosecution of forgery charges. *Id.*

And even these statistics understate the impact of the specter of criminal regulatory enforcement. Offenses involving productive economic and social conduct are uniquely subject to risks of over-deterrence. Unlike common law crimes, for which motivations of passion or circumstance often overcome calculation, the world of economic and social conduct is especially responsive to the *in terrorem* effect of criminal sanctions. As a consequence, the mere threat of criminal penalties becomes a tool in the arsenal of civil regulators to coerce compliance with otherwise ill-justified regulatory regimes. For example, one NFIB member, a home health-care provider, recently was compelled to settle with the local prosecutor, who threatened the company with criminal proceedings, fines, and jail. The company reported the Medicaid fraud of one of its employees, whom it fired. In terms redolent of a gangster novel, the prosecutor's office attempted to extract a six-figure fine from this company *before* any criminal charges were filed. This small, respectable business with a clean healthcare claims record settled simply "to make

the case go away," fearing local reprisals and negative publicity.

To be sure, many of these effects are solely domestic. But the foreign law interpretation question at the core of the instant Petitions is a natural outgrowth of these developments. Because social and economic conduct is, as we next demonstrate, subject to an unusual form of near-absolute liability, the structure of laws has the inevitable and essentially *unmeasurable* effect of causing social and economic actors to forego productive, beneficial conduct rather than risk the capricious exercise of prosecutorial discretion. Put more directly, Petitioners' case cannot possibly have been calibrated to achieve an appropriate level of societal deterrence.

Plainly, the importation of food into the United States is a socially beneficial activity – it feeds American citizens. Yet the inevitable effect of the excessive eight-year sentences rendered can only be the over-deterrence of this conduct. Costs will rise; fewer imports will enter the United States; and, in the end, Americans will have fewer gastronomic choices. One rather doubts the utility of this or that Congress intended such a result.

3. The facts of this case readily demonstrate how a simple public welfare offense, involving only modest penalties, can be transmuted through prosecutorial discretionary decision-making into a harsh felony prosecution. Underlying Petitioners' "crime" was a relatively straightforward civil violation of Honduran law (assuming, that is, that Honduran law had any legal application at all). That Honduran civil law in turn became the predicate for a mere *misdemeanor* violation of the Lacey Act, prohibiting the importation of "fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law," 16 U.S.C. § 3372(a)(2)(A).[4] Yet Petitioners' simple regulatory

[4] Petitioners Blandford and Huang were convicted of both misdemeanor and felony Lacey Act violations. For the misdemeanor convictions, the jury was instructed that they could be convicted if they knew or "should have known" of the underlying foreign law and regulations. Moreover, the jury instruction with respect to the felony

offenses somehow mutated into a criminal matter of near cataclysmic proportions.

Thus, though the bulk of the shipment of "illegal lobster tails" originally seized was not, in fact, "illegal" (save in the sense that they were packaged incorrectly) Petitioners' regulatory violation was creatively used as the predicate for a felony smuggling charge (a general intent crime) alleging the importation of goods into the United States "contrary to law." *See* 18 U.S.C. § 545. This smuggling charge, in turn, became the predicate for money laundering charges, *see* 18 U.S.C. § 1956(a), where the "money laundering" in question was nothing more than the normal commercial transaction of importing, paying for, and depositing the proceeds from the sale of the seafood in question in a bank account. *Cf. United States v. Scialabba*, 282 F.3d 475, 476 (7th Cir. 2002) (expressing doubt that Congress intended to criminalize use of funds that do not entail financial transactions "to hide or invest profits in order to evade detection, the normal understanding of money laundering"). As a consequence, Petitioner McNab is now serving a draconian sentence of 97 months imprisonment. Petitioners Blandford and Schoenwetter were sentenced to the same staggering prison terms, while Petitioner Huang was incarcerated for only two years. All for violating a foreign law and foreign regulations whose existence may not have been known to the defendants and whose construction is the subject of substantial doubt.

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charges against defendants required only that they be shown to have known that they violated foreign law – not any specific statutory or regulatory provision.

II. The Absence Of *Mens Rea* Requirements In Public Welfare Offenses Demands Certainty In The Determination of Foreign Law By Foreign Governments.

There would be relatively little difficulty with uncertainty in the determination of foreign law if actual knowledge of foreign laws were an element of federal offenses alleging their violation. As we next demonstrate, however, the Federal government has made a concerted effort to drain all regulatory criminal law of any intent requirement – an effort that demands a concomitant certainty in the determination of foreign law.

1. The requirement that a crime involve culpable purposeful intent has a solid historical grounding. As Justice Robert Jackson wrote:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Morissette, 342 U.S. at 250-51. Thus, the very earliest English common law recognized that one who intended to commit an act (say injuring a horse) and who mistakenly committed a different crime (killing the horse) could not be said to have intended the graver crime of intentionally killing the animal. *See Dobbs Case*, 2 East P.C. 513 (1770); *see also Thacker v.*

Commonwealth, 134 Va. 767, 114 S.E. 504 (1922) (defendant shot at a light and struck and killed a victim; not guilty of murder); *State v. Peery*, 224 Minn. 346, 28 N.W.2d. 851 (1947) (requiring proof of "intent to be lewd" in indecent exposure prosecution of defendant who was accidentally viewed through ground floor window by passers-by).

But this conception of intent (or what the Model Penal Code drafters called "purpose") -- that is, a conception necessitating proof that a defendant intended both to do the act which constituted the offense and to accomplish the particular harm prohibited -- did not long survive even in the common law. English and American courts have now come to the view that in most legal contexts a criminal actor who intends to engage in an act is liable for whatever harm eventuates, even if it is different from that which was within his original contemplation. *E.g. State v. Wickstrom*, 405 N.W.2d 1 (Ct. App. Minn. 1987) (defendant hit victim causing abortion of pregnancy; guilty of criminal abortion despite lacking intent to injure fetus). In the words of the Model Penal Code one can act "knowingly" or with the general intent to do the acts which constitute the offense without regard to any specific intent to do a wrongful act or violate a law. *E.g. People v. Garland*, 254 Ill.App.3d 827, 627 N.E.2d 377, 380-81 (1993) ("Specific intent exists where from the circumstances the offender must have subjectively desired the prohibited result. General intent exists when the prohibited result may reasonably be expected to follow from the offender's voluntary act even without any specific intent by the offender.").

2. This development has perverse consequences in the context of the rise of the "regulatory state" and the resulting growth in the cluster of problems involving the relationship of the criminal law to the conduct of economic enterprise. In the context of regulatory offenses the concept of intent has diminished, departing from its traditional understanding.

Building on the time-honored maxim that "ignorance of the law is no excuse," for example, courts now routinely conclude that one can be convicted of a crime for having acted knowingly

(that is purposefully doing an act) without the additional requirement that the government prove that the defendant had a conscious desire to achieve a particular end or to violate a known legal duty (typically one found in the form of a statutory or regulatory prohibition). Thus violations of the Sherman Antitrust Act require only proof of deliberate business conduct without proof of intent to monopolize or intent to violate the law. *E.g. United States v. United States Gypsum Co.*, 438 U.S. 422, 445–46 (1978).[5]

This description of the *mens rea* requirements that have developed in the regulatory context is deeply troubling. It makes clear the extent to which actors in a highly regulated industry are subject to criminal liability for their unknowing acts. Though the law often requires that they have acted "knowingly" -- a seeming protection from the imposition of strict liability -- that requirement is but a parchment barrier to what is, in effect, the imposition of absolute liability. Proof that one in fact lacked knowledge of the regulatory requirement at issue is, uniformly, no defense to the prosecution. *E.g. International Minerals & Chemical Corp.*, 402 U.S. at 565 ("[W]here * * * dangerous or deleterious materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

A common example illustrates the point: Consider, the crime of "knowingly filing a false monitoring report" under the Clean Water Act. *See* 33 U.S.C. § 1319(c)(4) (making it a crime to knowingly make a false statement in any certification required by the regulations promulgated by Environmental

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[5] Notably, in this example, a corporate executive will at least know that his company's market share is increasing, alerting him to circumstances that might warrant inquiry. In complex health, safety and environmental regulatory regimes there is often nothing extrinsic that will alert the average businessman to the proscribed nature of this conduct. Similarly, in today's global marketplace there is often no indication of a potential violation of foreign laws or regulations.

Protection Agency), *and* 40 C.F.R. § 122.41(*l*)(4) (requiring compliance with permit requirements, which require the filing of a "discharge monitoring report").[6] The law that defines what is false or misleading is part of a large regulatory scheme that also includes a regulatorily-imposed obligation on each individual to insure the accuracy of any reports made. As a consequence, the only showing the government must make to the satisfaction of a jury is that the defendant has "knowingly filed" the report, irrespective of whether or not he actually knew it was false. And since nobody files a report without doing so intentionally (reports do not get signed, sealed, and mailed by accident or mistake), the only showing necessary is the trivial showing that the defendant has purposefully put a letter in the mail. As Justice Potter Stewart noted: "As a practical matter, therefore, they are under a species of absolute liability for violation of the regulations despite the 'knowingly' requirement." *International Minerals & Chemical Corp.*, 402 U.S. at 569 (Stewart, J., dissenting).

Petitioners' case illustrates the point (and the dangers) readily. The underlying premise for the indictment and convictions is that Petitioners violated the Lacey Act by importing and selling lobster tails that allegedly were in violation of three Honduran laws, resolutions, and regulations. Yet, for more than six months the federal government was unable to discern what, if any, Honduran regulations had been violated. That uncertainty was no barrier to prosecution -- the Lacey Act, (like other regulatory criminal laws), does not require the Government to demonstrate that Petitioners had actual knowledge of those Honduran laws. Nor is it an element of the offense to prove that they had more generalized knowledge of the prohibitions of the Lacey Act. Indeed, for a misdemeanor violation the "should have known" standard suffices.

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[6] As this brief exegesis demonstrates, even discerning that the law criminalizes the filing of a false report is, itself a problematic endeavor.

Thus, all that is required is a showing that a defendant was aware of the nature of his or her conduct -- a showing that is trivial in the regulatory context as no economic actor routinely engages in business conduct by accident or without knowledge of the nature of his conduct. Rather he acts (as here by importing goods) with a purpose and, under current legal doctrine that purposeful act puts him on notice as to the entire panoply of attendant laws and regulations – a panoply that, under the Lacey Act, includes the laws and regulations of *every* foreign country. Moreover, this rule of law applies *even if* (as here) the construction and interpretation of those laws is indefinite and subject to dispute even by the sovereign who has adopted them. Contemporary regulatory criminal law thus dispenses with any pretence that it criminalizes the conduct only of those who have a wrongful intent.

3. What is particularly disturbing about the trend toward diminished intent requirements is that it is exacerbated by a trend toward significantly harsher penalties. Historically, when the courts first considered regulatory laws containing reduced intent requirements, the laws uniformly provided for very light penalties such as a fine or a short jail term, not imprisonment in a penitentiary. *See Staples*, 511 U.S. at 616 (citing *e.g. Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine up to $200 or 6 months in jail); *Commonwealth v. Farren*, 91 Mass. 489 (1864) (fine only); *People v. Snowburger*, 113 Mich. 86, 71 N.W. 497 (1897) (fine up to $500 or incarceration in county jail)).

As early commentators noted, modest penalties are a logical complement to crimes that do not require specifie intent. *See* Francis B. Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55, 70 (1933); *see also Morissette*, 342 U.S. at 256 ("penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). Indeed, initially some courts questioned whether any imprisonment at all could be imposed in the absence of intent and culpability. *E.g. People ex rel. Price v. Sheffield Farms-Slawson-Decker, Co.*, 225 N.Y. 25, 32–33, 121 N.E. 474, 477 (1918) (Cardozo, J.);

id. at 35, 121 N.E. at 478 (Crane, J., concurring) (imprisonment for crime that requires no *mens rea* stretches law of regulatory offenses beyond its limitations). But this historical view has now been lost. Regulatory laws with reduced *mens rea* requirements are often now felonies. *E.g. United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (felony violation of Clean Water Act—no knowledge of regulations necessary).[7]

And, through the pyramiding of serious felonies on top of minor regulatory offenses, even modest crimes can be "enhanced" into significant terms of imprisonment. For example, in Fiscal Year 2001, the average term of imprisonment for Environmental and Wildlife offenses in the Eleventh Circuit was only 9.6 months. *See* United States Sentencing Commission, Federal Sentencing Statistics By State, District & Circuit, Table 7 ("Average Length of Imprisonment By Primary Offense Category") (2001) (http://www.ussc.gov/judpack/2001/11c01.pdf). The contrast between this modest penalty and the 97-month sentence that three of the Petitioners received for their own "wildlife" offense is self-evident.

4. As Justice Thomas recently wrote in a different domestic regulatory context (involving construction workers), the broad view of the appropriate scope of criminal law adopted by the Eleventh Circuit in this case "expose[s] countless numbers of . . . workers to heightened criminal liability for using ordinary devices to engage in normal industrial operations." *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of certiorari). Supreme Court precedent, has

> never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to

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[7] And even misdemeanor offenses can, through the stacking of sentences, result in substantial terms of incarceration *E.g. United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001) (misdemeanor convictions stacked for 3 year sentence).

> extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety.

Id. So, too, presumably, with lobster importers, or sewage treatment workers, or automobile manufacturers, accountants, bartenders, garbage collectors, sports referees, or even (dare we say) lawyers.

In short, historical changes in the *mens rea* requirements have been substantial. The criminal law today is far different from the criminal law of 100 years ago. For regulatory crimes there is, in effect, a standard of near-absolute liability. This interpretation of regulatory statutes with increasingly onerous criminal penalties has lost sight of a fundamental truth: "If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary." *Weitzenhoff,* 35 F.3d at 1293 (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

Put another way, given the comprehensive nature of regulation in America society today, the growth of the public welfare doctrine has, in effect, led to the abandonment of any intent requirement for virtually the entire range of commercial, social, and economic activity in the marketplace. This situation is fundamentally wrong. For as the drafters of the Model Penal Code said:

> It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. Crime does and

> should mean condemnation, and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised.

American Law Institute, Model Penal Code § 2.05 and Comments at 282–83 (1985).

This case is a paradigmatic example of how these expansive doctrines of liability can be misapplied to a context in which the scope of the underlying laws are uncertain, at best. Petitioners' manifestly unjust eight-year sentences for the importation of lobster tails -- without knowledge of the underlying Honduran regulations and without clarity in Honduran law on the construction of those regulations -- call out for correction.

The criminal law has moral foundations. At some point a limit on the ability of a legislature to criminalize social conduct must exist. We submit that these Petitions have reached that point: When the judicial system punishes with extraordinary sanctions conduct that lacks any criminal intent and that violates a foreign law, which the foreign government itself now disclaims, review is appropriate.

Had the Eleventh Circuit appropriately deferred to the considered position of the government of Honduras there would have been no scope for the application of the pernicious doctrines we have identified. The existence of these expansive doctrines of criminal liability demands, at a minimum, judicial deference to the foreign law determinations of a foreign government.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

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Respectfully submitted,

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